

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Final Decision

EUGENE REDA
Complainant

GRC Complaint No. 2002-58

v.

TOWNSHIP OF WEST MILFORD
Custodian of Record.

Decision Issued: January 17, 2003
Decision Effective: January 31, 2003

At its January 17, 2003 public meeting, the Government Records Council considered Complaint #2002-58 filed pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., against the Township of West Milford. The Complaint alleged a denial of access to: (1) e-mails among the Township Manager, Clerk and two Council members; (2) annual amount paid by the Township in liability settlements and legal defense costs; and (3) copies of legal opinions by the Township attorney.

The Council considered the Requester's complaint and communication to the Township dated September 19, 2002, the Custodian's Statement of Information, a letter from the Custodian's attorney dated January 13, 2003 and the Executive Director's Findings and Recommendations dated January 13, 2003.

The Council having decided by affirmative vote of four Council members at its January 17, 2003 meeting to adopt the attached Findings and Recommendations of the Executive Director dated January 13, 2003, the Council herewith dismisses the portion of the Complaint concerning Items (2) and (3) above.

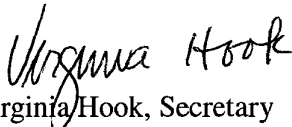
With respect to Item #1 above, the Council orders the Custodian to submit to the Council by February 21, 2003 proof that the e-mails are not government records accessible under OPRA.

A copy of this Decision shall be provided to the requester, the custodian, and all counsel of record. Any application for a stay of this Decision must be filed with the Council by January 31, 2003.



VINCENT MALTESE, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council:



Virginia Hook, Secretary
Government Records Council

Dated: January 17, 2003

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendation of Executive Director
January 13, 2003**

EUGENE REDA
Complainant

v.

TOWNSHIP OF WEST MILFORD
Custodian of Record.

GRC Complaint No. 2002-58

Records Requested:

- (1) E-mails among Township Manager or Township Clerk and two Council members
- (2) Annual amount paid in of liability settlements, including legal defense costs
- (3) Copies of specific legal opinions by Township Counsel

Request made: September 19, 2002

Custodian: Kevin J. Byrnes, Township Clerk

Request denial: (partial) September 30, 2002

GRC Complaint filed: October 4, 2002

Executive Director's Recommendation

The Executive Director recommends the following:

- (1) E-mails: that the Council require the Township to submit to the Council and requester proof within 20 business days that the e-mails contain privileged material which would preclude their release, including advisory, consultative, or deliberative material. If, upon review of those submissions, there remains any question as to whether the privilege applies to any particular e-mail, the Council can commence adjudication of this portion of the Complaint.
- (2) Cost of liability settlements and defense costs: that the Council dismiss the portion of the Complaint seeking these records because the request seeks information rather than specific records in the custodian's possession. Furthermore, the New Jersey Intergovernmental Insurance Fund, not the Township, has custody of records likely to contain this information. The requester may file an OPRA request with the Fund at the address provided by the custodian.
- (3) Copies of specific legal opinions: that the Council dismiss the portion of the Complaint seeking these records because no written legal advice was rendered. However, as a courtesy, the attorney has memorialized his verbal advice in a recent writing and provided same to requester.

Request #1: E-mails

Statements of Facts

Requester seeks e-mails sent or received by the Township Manager or Township Clerk and Councilman Gargano and/or Councilman Szuszkowski between January 1, 2002 and the date of the request, September 19, 2002. The custodian denied the request on the basis that the emails were "intra-agency advisory, consultative or deliberative materials" (ACD) and, thus, not "government records" accessible under OPRA. N.J.S.A. 47:1A-1.1. The custodian offered no evidence describing of the general content of any email for the Council to assess the validity of the claim as to any particular e-mail communication.

On January 13, 2003, the Township attorney advised the Council that he would review the e-mail personally and provide the Council with additional evidence in support of any ACD claim being made for each item.

Analysis and Conclusion

While OPRA makes it clear that the record custodian bears the burden of proving that any denial of access is lawful under OPRA (N.J.S.A. 47:1A-6), the custodian's attorney has asserted the intra-agency advisory, consultative or deliberative material exemption under OPRA. It should be noted that this is the first case presented to the Council where this exemption is claimed.

There is no statute or evidence rule expressly creating a deliberative process privilege. However, the New Jersey Supreme Court has recognized that inter-agency or intra-agency memoranda addressing pre-decisional policy matters is generally not publicly accessible. The purposes include:

- (1) To assure that subordinates freely discuss their opinions and recommendations with the decision maker;
- (2) To prevent premature disclosure of proposals before they have been discussed and adopted; and,
- (3) To avoid misleading the public by dissemination of information not reflective of the agency's true policy or rationale for acting. .

However, simply declaring a communication ACD does not automatically make it so. As with all privileges, application of the ACD privilege is limited to those circumstances that support its underlying policies. The Township attorney may submit his own certification along with those of the sender and receiver of the e-mail explaining the general content of the email or the topic it addresses and why it is ACD with respect to Township officials.

The Township attorney should not submit the content of any privileged material to the GRC at this time. If, after reviewing the submissions, the Council finds there is insufficient evidence to conclude whether particular e-mail is privileged, the Council can decide to commence adjudication of this portion of the Complaint.¹

For this reason, it is recommended that the Council issue an Order requiring the Township attorney to submit any additional information documenting the claim of privilege with respect to the e-mail by a date certain. The Council should also keep this Complaint open until such time as it can render a decision on the privilege claim or undertake further adjudication.

Request #2: Costs of Settlement

Statement of Facts

The requester initially sought the annual costs of liability settlements by the Township for each of the past five years, including costs for "legal defense of said items." Subsequently, the requester stated that he was seeking data pertaining to any settlement based upon a claim of "action taken or ...specific failure to act." Ultimately, the requester further modified his request on September 19, 2002 to seek "every liability

¹ Revealing the content of allegedly privileged material to anyone other than the attorney, the attorney's agents or the ultimate trier of fact in an adjudicatory proceeding has been held by some courts to constitute a waiver of the privilege. See Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414(3d Cir.1991). Under this approach, once the Council has commenced adjudication, Council members, GRC staff, or an Administrative Law Judge may view confidential materials without compromising the privilege.

settlement by the Township, by item and year, for each of the last five years” including “the costs incurred by the Township or its liability provider for the legal defense of same.” (emphasis supplied).

The custodian responded that the Township is a member of the New Jersey Governmental Insurance Fund (Fund), a joint insurance fund organized pursuant to N.J.S.A. 40A:10-36. This law permits local government units, either alone or in a group, to insure against liability and property damage. The law permits coverage through self-insurance, the purchase of commercial insurance, reinsurance, or any combination thereof.

The Fund maintains its own records. The custodian stated that it provided the requester all the information it had in its possession relevant to the request as well as the name and address of the Fund in possession of all other records likely to contain the information sought. The requester has submitted no evidence to the GRC that he has filed an OPRA request with the Fund for the information he seeks.

Analysis and Conclusion

The custodian has indicated in its Statement of Information that the Fund is in possession of records likely to contain the information sought by the requester. OPRA does not obligate a custodian to produce records that are not in the custodian’s possession. Based on the responsibilities assigned to the Fund under New Jersey law and the Township’s decision to supply the requester copies of the limited number of records in its possession relevant to the information sought, there is no reasonable basis to conclude that the Township is withholding access to any settlement or insurance cost information sought by the requester. A separate request for this information may be directed to the Fund. This portion of the Complaint should be dismissed.

More fundamentally however, this portion of the Complaint should be dismissed because the requester has not identified any specific record in the custodian’s possession pertaining to liability settlement or costs, but merely requests information. OPRA does not require record custodians to conduct a research among its records for a requester and correlate data from various government records in the custodian’s possession. This request appears to be more of a request for information, not a records request. While a request for certain records may include the information, it is incumbent on the requester to perform any correlations and analysis he may desire.

Request #3: Legal Opinions

Statement of Facts

The requester seeks “copies of any legal opinion requested of or received on conflict of interest questions concerning any of Councilman Gargano’s votes on redevelopment tract” (sic). Requester claimed that “Township officials” advised him that there were two different opinions, both verbal, issued by this attorney, specifically related to whether or not Mr. Gargano excused himself from a vote on the redevelopment tract...because of a perceived conflict of interest or any other ethical concerns.” If the opinions are verbal, the requester asks that they be documented [reduced to writing] and “certified as true.”

The custodian indicates in his Statement of Information that the Township attorney has provided the requester a writing containing the attorney’s original, verbal opinion concerning the subject in question.

Analysis and Conclusion

Under normal circumstances, an attorney’s advice to a client is usually considered a confidential attorney-client communication (AC) under OPRA. The privilege can be waived if the content of the conversation or writing is published or shared with a third party. In this matter, the Township has consistently stated

that any advice given was oral in nature and that there was no writing, electronic or otherwise, to produce for the requester. It is unlikely that the Township would be misrepresenting this fact; it could claim confidentiality for any written legal advice if it existed. In this case, the attorney chose to create a writing in response to the request and provided a copy to the requester. This action does not create any liability for the custodian under OPRA since the record did not exist at the time the OPRA request was made.

For these reasons, it is recommended that the Council dismiss this portion of the requester's complaint.

A handwritten signature in cursive script, reading "Marc H. Pfeiffer", is written over a horizontal line.

Marc H. Pfeiffer, Acting Executive Director
Government Records Council

Dated: January 13, 2003